

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1049

To be argued by
RICHARD F. LAWLER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1049

UNITED STATES OF AMERICA,

Appellee,

—v.—

GUILLERMO ROSADO, JR. a/k/a

"WILLIAM MONTIJO, JR.,"

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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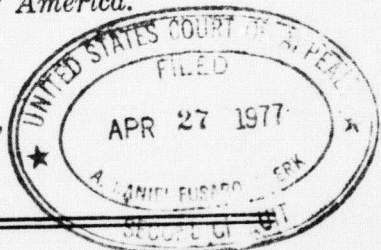


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GUILLERMO ROSADO, JR. a/k/a
"William Montijo, Jr.",

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Guillermo Rosado, Jr., a/k/a "William Montijo, Jr.," appeals from a judgment of conviction entered on November 23, 1976 in the United States District Court for the Southern District of New York after a two day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 878, filed on August 29, 1976 charged Guillermo Rosado, Jr. ("Guillermo"), and two others * in four counts with conspiracy and with viola-

* The other defendants were Osvaldo Rosado, a/k/a "Cano Montijo" and Rubin Rosado, a/k/a "Rubin Montijo." Osvaldo Rosado, the brother of the defendant, pleaded guilty on November 13, 1975 to four counts of an eight count superseding indictment

[Footnote continued on following page]

tions of the federal firearms laws. Count One charged all three defendants with conspiracy to violate the federal firearms statutes from August 4, 1975 to August 8, 1975, in violation of Title 18, United States Code Section 371. Count Two charged that all three defendants made and altered a .225 caliber rifle on August 7, 1975 without obtaining approval from the Secretary of the Treasury or paying the tax due in violation of Title 26, United States Code Sections 5821, 5822, 5861(f) and Title 18, United States Code Section 2. Count Three charged that on the same date all three defendants possessed the .225 caliber rifle without having registered it with the National Firearms Registration and Transfer Record, in violation of Title 26, United States Code Section 5861(d) and Title 18, United States Code Section 2. Count Four charged all three defendants with having transferred said rifle on August 8, 1975 without obtaining approval for the transfer or paying the transfer tax due in violation of Title 26, United States Code Sections 5811, 5812, 5861(e) and Title 18, United States Code Section 2.

Trial began on November 22, 1976 and ended on November 23, 1976 when the jury found the defendant guilty on all counts.

On December 28, 1976 Judge Pollack sentenced Guillermo Rosado, Jr. as a youthful offender pursuant to Title 18, United States Code Section 5010(b) to a six year indeterminate term of imprisonment on each of the four counts, to be served concurrently.

The defendant is presently serving his sentence.

75 Cr. 1086 charging various violations of the firearms law. Osvaldo Rosado was sentenced under the Youth Corrections Act to an indeterminate six year term of confinement. He is presently in jail. Rubin Rosado was never apprehended and is presently a fugitive.

Statement of Facts

The Government's Case

A. The First Meeting

On August 7, 1975 Clyde Allen, a paid Government informant, received a telephone call from Osvaldo Rosado ("Osvaldo") who told him that his brother had a 30-30 gauge rifle to sell. (Later events revealed that Osvaldo's brother was Guillermo Rosado, Jr. ("Guillermo"), the defendant who now appeals his conviction). Osvaldo asked Allen to get in touch with his friend "Joe", to whom he had previously sold weapons, to see if he was interested in buying the rifle. (Tr. 69-70, 76-77). The person known to Osvaldo as "Joe" was Special Agent Joseph Kelly of the Bureau of Alcohol, Tobacco and Firearms.

Allen told Agent Kelly of the offer. Pursuant to his conversation with Agent Kelly, Allen called Osvaldo to arrange a meeting to view the rifle that evening. During the same telephone call, Allen spoke with Osvaldo's brother, Guillermo, about the price to be paid for the gun. (Tr. 23, 40).

That evening, August 7, 1975, Agents Kelly and Allen drove to 154 South Broadway, New York, New York, where the Rosado family lived. Osvaldo met them outside the building and said the gun was not yet cut down. Agent Kelly informed Osvaldo that he would not pay more than \$150 for the rifle. (Tr. 25). Allen went into the building, up to the Rosado apartment and into a room described as Osvaldo's bedroom. There he observed the rifle barrel being sawed off with a hacksaw by Osvaldo, Guillermo and Rubin Rosado who all took turns cutting because the blade on the hacksaw was dull. (Tr. 71-72). Allen returned to the car and described the scene to Agent Kelly. They both went up to Osvaldo's bedroom in the

Rosado apartment where Agent Kelly observed Guillermo, Osvaldo and Rubin Rosado cutting the rifle barrel with the dull blade. (Tr. 27, 72-73). Since the process of cutting the rifle was proceeding slowly, arrangements were made for Agent Kelly to return the next day to complete the sale. (Tr. 27).

Both Allen and Agent Kelly identified Guillermo Rosado as the person they saw in the apartment that day cutting the barrel. (Tr. 28, 71).

B. The Sale

At approximately 4 p.m. on August 8, 1976 Agent Kelly and Allen picked up Osvaldo after work, and at his request, drove him to a hardware store where Osvaldo purchased a new hacksaw blade and then to 154 Broadway where Osvaldo went upstairs. Shortly thereafter Agent Kelly and Allen went up to the Rosado apartment where they found Guillermo and Osvaldo, as well as the rifle which had now been cut down at the barrel and at the stock. (Tr. 30, 73). Osvaldo handed the gun and three rounds of ammunition to Agent Kelly and told Kelly to "give the money to Willy." (Tr. 29-30, 73-74). Agent Kelly thereupon paid Guillermo \$150. Osvaldo was paid \$20 by Agent Kelly for arranging the sale.* (Tr. 37).

Osvaldo was arrested on August 19, 1975 pursuant to an arrest warrant. Guillermo was a fugitive until July 1976 when he was arrested by police in Miami, Florida.

* Allen was later paid \$55 for his part as an informant for Agent Kelly. He was paid a total of approximately \$1500 by Agent Kelly during the course of all of his activities as an informant for the Bureau of Alcohol, Tobacco & Firearms. (Tr. 37).

C. The Weapon

The rifle sold to Agent Kelly was a .225 caliber rifle, serial number 183906, with a barrel length of 10 $\frac{5}{8}$ inches. The weapon fit the definition of "rifle" set forth in Title 26, United States Code, Section 5845. (Tr. 31-36; GX 1). The gun was in operable condition and the ammunition was live. (Tr. 112-14; GX 1A, 1B, 1C).

The weapon was not registered with the National Firearms Registration and Transfer Record to Guillermo, Osvaldo or Rubin Rosado; nor did any of the three apply to the Secretary of the Treasury for permission to alter or to transfer the firearm; nor did any of the three pay the taxes due for altering or transferring such a weapon. (Tr. 21; GX 20-26).

The Defense Case

The defendant called his mother, Maria Rosado, who testified that Clyde Allen had never been in her apartment. She also said that she had never seen Agent Kelly in the apartment. (Tr. 123-25). She was sure they had not been in the room without her knowledge because she always knew when her son was in his room and she always saw everyone who went into her son's room. (Tr. 127, 131). She said that she did not have a nephew named Rubin Rosado nor did she know of any friend of her sons' named Rubin. (Tr. 131). Both Agent Kelly and Allen had testified that Osvaldo Rosado was known by the nickname "Cano" and Mrs. Rosado denied that she ever knew him by any name other than Osvaldo. (Tr. 122).

Osvaldo Rosado, the defendant's brother, was the only other witness called by the defendant. Claiming complete and sole responsibility for the events on August

7 and 8, 1975, Osvaldo testified that he had often been involved in the sale of illegal guns but that his brother had no such involvement (Tr. 133). Osvaldo testified that on August 7, 1975 Allen and Agent Kelly had come up to his bedroom and viewed the rifle and then returned the next day to buy it from him. (Tr. 140-45). He said that his brother Guillermo had come into the room for two or three minutes when Agent Kelly, Allen and he were there looking at the gun on August 7th but that Guillermo had simply been introduced to Agent Kelly and Allen and had not participated in any way in the transaction. (Tr. 150-51). In fact Osvaldo said that Allen had helped him saw the barrel (Tr. 143) and Agent Kelly had purchased the new hacksaw blades for him. (Tr. 147).

Osvaldo said that he received \$150 for the gun and \$20 for arranging the sale of the gun. He claimed that his brother did not share in the proceeds of the sale. (Tr. 153-156).

Osvaldo said he is known by the nickname "Cano" and both his brother and his mother refer to him by that name. (Tr. 156).

The defendant did not take the stand.

ARGUMENT

POINT I

The Evidence Against Guillermo Rosado, Jr. Was More Than Sufficient.

Without even attempting to disguise his argument as a challenge to sufficiency, defendant unabashedly asks this Court to reverse his conviction because a "fair assessment of the evidence" should have resulted in an acquittal. (Br. 12). Thus, most of the defendant's brief on

appeal is devoted to jury arguments, which simply have no place before this Court. On many occasions this Court has reiterated its unwillingness to usurp the jury's function. See e.g., *United States v. Rastelli*, Dkt. No. 76-1350, slip op. 2473, 2477 (2d Cir. March 18, 1977); *United States v. Sears*, 544 F.2d 585, 586 (2d Cir. 1976); *United States v. Simon*, 425 F.2d 796, 799 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).

To the extent that the defendant contends that the evidence was insufficient, the claim must be rejected. The frequently enunciated test for sufficiency is whether "a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt." *United States v. Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976). Accord *United States v. Mejias*, Dkt. No. 76-1334, slip op. 2889-90 (2d Cir. Mar. 10, 1977); *United States v. MacDougal-Pena*, 545 F.2d 833 (2d Cir. 1976); *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972). For these purposes the government's case must be evaluated by viewing the evidence in the light most favorable to the Government. *United States v. Mejias*, *supra*, at 2289.

A claim of insufficiency cannot be seriously advanced on the record of this case. The jury was not required to draw any tenuous inferences since it had before it the testimony of two eyewitnesses, Agent Kelly and Allen, who testified that they saw the defendant assist in cutting off the barrel of the rifle with what appeared to be a dull hacksaw blade. (Tr. 27, 72). Both also testified that they went back to the Rosado apartment the next day where Agent Kelly paid the defendant \$150 for the weapon. (Tr. 30, 74). Kelly and Allen each identified the defendant and the weapon at trial. (Tr. 28, 30, 73). In addition Allen testified that Osvaldo, in originally

offering the gun to him, said that it belonged to his brother Willy. Allen also spoke by phone to the defendant, who said he would sell the rifle for \$150. (Tr. 70).*

In addition there was evidence that Guillermo had been a fugitive for nearly one year after a warrant had been issued for his arrest. (Tr. 38). Such behavior can be received as showing consciousness of guilt. *United States v. Acardi*, 342 F.2d 697, 700 (2d Cir. 1965); *United States v. Lefkowitz*, 284 F.2d 310, 315-16 (2d Cir. 1960).

Defendant's claim of mere presence is wholly misplaced in this case. A defendant is not merely present when he actually furthers the crime. *United States v. Terrell*, 474 F.2d 872, 876 (2d Cir. 1973); *United States v. Minieri*, 303 F.2d 550, 557 (2d Cir.), cert. denied, 371 U.S. 847 (1962); cf. *United States v. Williams*, 341 U.S. 58, 64 (1951). In this case the defendant negotiated the sale of the weapon by phone, assisted in sawing down the barrel and received the proceeds of the sale. The defendant urges this Court to accept the defense version of the case, which attributed sole responsibility for the crime to the defendant's brother. Of course the jury was entitled to disbelieve the testimony of the defendant's

* Defendant cannot even raise a viable challenge to any one count of the indictment. As to each count, there was more than sufficient evidence. Evidence of a conspiracy (Count One) was present throughout the trial from the first phone call to the sawing down the barrel by all three defendants. The altering of the rifle charged in Count Two was proven by the testimony of both Agent Kelly and Allen who saw the defendant cut down the barrel. The possession, charged in Count Three, was shown by defendant's statement to Allen that the gun was his and corroborated by the fact that he received the money from the sale. Count Four charged a transfer of the weapon and this was proven by the defendant's negotiation for the sale and acceptance of the money for the weapon.

brother Osvaldo. *United States v. Schwartz*, 548 F.2d 427, 430 (2d Cir. 1977).*

As his last complaint, the defendant registers objection to the District Court's questioning of the defendant's brother. (Br. 15). As the defendant notes, the import of the Court's inquiry was to elicit Osvaldo's admission that he told the truth when he pleaded guilty in this case. Since the fact of Osvaldo's guilt was the central thesis of Guillermo's defense, he can hardly contend that this inquiry prejudiced his case.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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* Defendant complains that it was difficult for the jury not to attach Osvaldo Rosado's guilt to that of his brother Guillermo. (Br. 13). Any such problem is entirely of his own making as it was defendant who called Osvaldo Rosado. (Tr. 133).

AFFIDAVIT OF MAILING

STATE OF NEW YORK)

) ss.:
COUNTY OF NEW YORK)

Richard Lawler being duly sworn deposes
and says that he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the 27 day of April
he served a copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

Darrell Blackett
401 Broadway
NY NY 10013

And deponent further says that he sealed the said envelope and
placed the same in the mail box for mailing at the United States
Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Richard Lawler

Sworn to before me this

27th day of April, 1977

Phyllis A. Rush

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4635198
Qualified in Bronx County
Commission Expires March 30, 1978